In the Supreme Court of the United States

OCTOBER TERM 1968

No. 1217

EDWARD LOUIS HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1968 (II R. 68; Pet. App. A 3). A petition for rehearing was denied on January 22, 1969 (II R. 69–74). The petition for a writ of certiorari was filed on April 1, 1969 and is, thus, out of time under Rule 22(2) of this Court.

QUESTION PRESENTED

Whether non-taxpaid whiskey was properly seized from petitioner's backyard.

STATUTE INVOLVED

Code of Georgia, Title 27–207 provides:

> An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant.

STATEMENT

After a nonjury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on a one-count indictment charging possession of non-taxpaid whiskey, in violation of 26 U.S.C. 5205(a)(2) and 5604(a) (I R. 1, 3). On May 27, 1968, he was sentenced to imprisonment for one year and a day (I R. 61–62). The court of appeals affirmed (Pet. App. A 3).

The court held a pre-trial hearing on petitioner's motion to suppress evidence of the non-taxpaid whiskey seized at the time of his arrest. City detective Freeman of Macon was the only witness at this hearing and the court denied the motion (I R. 11, 40). At the trial Freeman testified substantially as he had done on the motion to suppress.

Freeman's testimony showed that, on July 28, 1967, at about 6:00 p.m., he received a telephone call from an anonymous informant that some whiskey had just been set off in the two hundred block of Holloway Street. Freeman called federal agents Farmer and Braxton and told them to meet him and detective

Joyner at this address (I R. 16, 41–42). When Freeman and his partner passed this address they saw, from a distance of about 30 feet, petitioner in his backyard. He had a plastic 5-gallon container in his hands and, with the aid of another man, was pouring a clear liquid through a funnel into a gallon jug. There was a strong odor of alcohol in the vicinity (I R. 16, 41–42). Freeman, who had known petitioner for thirty years, knew that petitioner had a reputation for being in the liquor business (I R. 24–25).

When the officers stopped their car and alighted, both men looked up and ran toward the front of petitioner's house (I. R. 27). The officers ran through the premises around the side of the house and heard a door slam at the front of the house. They knocked on the door but there was no answer. The officers went to the backyard and then heard another door slam. They ran back to the front of the house and observed petitioner running down the street (I R. 30, 38, 42–43). The officers went to the backyard where they found 14 plastic one-gallon jugs and three glass jugs containing whiskey. The five-gallon plastic jug from which petitioner had been seen pouring a liquid contained about three gallons of whiskey. At the rear of the lot, the officers found two five-gallon plastic jugs covered up with sacks, both full of whiskey (I R. 43). There were no tax stamps on any of the whiskey (I R. 44, 50).

About ten minutes later petitioner returned and asked the officers what was going on. They told him he knew what was going on, and that he was under

arrest (I R. 43, 51). A few minutes later, federal agents arrived and told petitioner again that he was under arrest and advised him of his rights (I R. 43).

ARGUMENT

As noted above, the petition for a writ of certiorari is out of time. In any event, no issue of substance is raised requiring review by this Court.

Petitioner does not deny that the local officers had probable cause to believe that he was in possession of non-taxpaid liquor at the time they entered the backyard. His claim is that the officers could not rely on probable cause since, under Georgia law, possession of non-taxpaid whiskey is a misdemeanor and officers may arrest only for a crime committed in their presence. But the officers did observe the offense being committed in their presence. They saw petitioner pouring the clear liquid and smelled the distinctive odor of moonshine whiskey. In any event, under Georgia law, an officer may arrest without a warrant if the offender is trying to escape (see Pet. 4–5) and petitioner ran when the officers entered his premises.

It is immaterial that the search and seizure preceded the arrest by about ten minutes. The liquor was in open view and subject to seizure without necessity of a search. *United States* v. *Lee*, 274 U.S. 559; *United States* v. *Young*, 322 F. 2d 443 (C.A. 4). The officers had lawfully entered upon the premises to arrest petitioner and, if petitioner had not run away they would have arrested him immediately. The officers thus had the right to seize the contraband which

was before them in a place where they had a right to be. See *Harris* v. *United States,* 331 U.S. 145, 154–155. In any event: "When probable cause for an arrest exists independently of what the search produces, the fact that the search precedes the formal arrest is immaterial when the search and the arrest are nearly simultaneous and constitute for all practical purposes but one transaction." *Holt* v. *Simpson,* 340 F. 2d 853, 856 (C.A. 7); *United States* v. *Boston,* 330 F. 2d 937, 939 (C.A. 2); *Busby* v. *United States,* 296 F. 2d 328, 332 (C.A. 9), certiorari denied, 369 U.S. 876.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969